No. 14405

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* *vs.* ROBERT V. H. SUGDEN and JEAN S. SUGDEN, *Appellees*	*Appeal from the United States District Court for the District of Arizona*

APPELLEES' REPLY BRIEF

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SUPPLEMENTAL FACT STATEMENT

Appellants' fact statement is, in the main, correct. However, it unfairly slants the effect of certain evidence bearing upon the intent of appellees in operating their station prior to the time their operators' license arrived.

At all times involved the station was duly licensed and appellees held operators' licenses on the date of the third and

last "listening in" by the witness for the Government, Mr. Stratton.

Appellees purchased their radio equipment through "Bud" Bridges, Motorola salesman and technician for the area (T.R. 62). Appellees were completely unfamiliar with Federal Communications law and regulations and, respecting the outstanding position of Motorola in that field, looked to Bridges for direction and guidance (T.R. 62, 63, 64, 65, 70, 71, 72, 73). Bridges obtained their station license for appellees. Appellees inquired of Bridges as to their need for an operators' permit in June when the station was ordered and he advised them not to worry, he (Bridges) would take care of it when the time came (T.R. 63, 71); that no examination was required (T.R. 63). After the station was in operation Bridges informed appellees they would need operators' permits and gave them some forms to fill out and send in (T.R. 64, 71). The station was then in operation in appellees' home where Jean Sugden took care of it while attending to her general household duties. (T.R. 71, 72). Bridges at no time advised appellees that the station should not be operated until their operators' licenses arrived and he was present while the station was being operated. (T.R. 64, 65, 72). Actually this type of permit is a mere formality issuing upon application as of course, without examination, provided the applicant is a citizen, has no felony history and indicates he or she is familiar with the rules and regulations (T.R. 48, 45). Appellees' applications for these permits were received September 9th, but, being incomplete, were returned and the actual permits were not recieved by appellees until September 17th, the day before the last "wireless tapping" by the witness Stratton (T.R. 46, 47, 68).

The fact statement that the witness Kieling warned appellees against use of the radio is unfounded and unfair. In fact, in July, before the station was even licensed he told them how to hook it up temporarily for use without any warning against use (T.R.

76, 77). All this witness testified was that in September he gave Mrs. Sugden forms for the permits — and told them the completion report could not be filled out since they did not have their operators' permits (T.R. 76, 77, 78). He was the radio technician regularly employed in the office of the Sheriff of Yuma County checking out their station — it was then in operation and had been for some time, yet he made no effort to warn appellees that they should not operate the station.

All of the evidence adduced was to the effect that the failure of appellees to have these informal operators' permits resulted from pure inadvertence in the belief that the expert from Motorola who sold them the equipment would fully acquaint appellees with all requirements for the lawful operation of the station. Indeed, but for the mischance of the lack of a couple of check marks on the applications (T.R. 47, Exhibits 1 and 2) the permits would have been issued on the only tape recorded conversations of appellees. In any event, under no construction of the evidence can a finding be made that the acts of appellees in operating the station without permits was done "willfully or knowingly" in violation of the law or any regulation.

REPLY ARGUMENT

Any argument seeking to persuade this Court to accept the search and seizure idea would be a waste of the time of court and counsel, since such acceptance would require the Court to overrule *Olmstead vs. U. S.,* 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed. 944, and *Goldman vs. U. S.,* 316 U.S. 129, 62 S.Ct. 993, 86 L. Ed. 1322, and *On Lee vs. U. S.,* 343 U.S. 947, 72 S.Ct. 967, 96 L. Ed. 1270. Accordingly, we will, without waiving our belief that the disenting opinions in the Olmstead case and following cases, represent the sound constitutional approach to the search and seizure question involved, perforce pass to the main questions involved.

Before proceeding to answer the main points made by the Government, a further brief fact statement is, we believe, in order.

The record affirmatively shows that the Federal Communications Commission, in coming to Arizona for the purpose of intercepting communications between appellees, did not come here as a part of any routine check up or other routine discharge of the duties imposed by law on that body. Rather, it was for the purpose of cooperating with the Department of Justice in an attempt to build a criminal case against appellees. (T.R. 34, 35). The station was then a regularly licensed station with an assigned frequency and there was no claim, or pretense of claim, that the station was not operating properly and a mere routine call at the station would have disclosed whether or not in fact the operators had then obtained their permits. In fact, this could have been ascertained through a check of the records of the Federal Communications Commission office in Los Angeles without even coming to Arizona. At the time when the agent of the Federal Communications Commission intercepted the communications between appellees on September 18th, the agent then knew that the station was fully licensed and that the operators thereof, appellees, likewise then held the necessary permit.

We have the situation, therefore, of officers of the United States charged with enforcing its laws acting in almost contemptuous disregard of the provisions of Section 605 of Title 47, U.S.C.A., commonly referred to as the Federal Communications Act. We will discuss this point further in connection with our argument based upon the case of *McNabb vs. U. S.,* 318 U.S. 332, 87 Law Ed. 819, 63 S.Ct. 608.

First, appellants attempt to distinguish the *two Nardone cases* (302 U.S. 379, 82 Law Ed. 314, 58 S.Ct. 275, and 308 U.S. 338, 84 Law Ed. 307, 60 S.Ct. 266) and the *Weiss case* (308 U.S. 321, 84 Law Ed. 298, 60 S.Ct. 269) on the basis that there is here involved radio conversations which were intercepted rather

than telephone conversations, apparently attempting to draw some distinction due to the difference in the media through which the electrical impulses were transmitted in this case and in the cases above referred to.

The language of Section 605 draws no such distinction. In fact, as the court noted in the *Weiss case,* the statutory prohibition against interception of messages and use thereof had existed from the beginning of regulation of radio, but was not extended to telephoned and telegraphed messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications Commission. A casual reading of Section 605 rather effectively disposes of this contention, since there is not the slightest intimation even of intent to differentiate between radioed and telephoned conversations in the statute.

In addition, inferentially, in *On Lee,* supra, the Supreme Court recognized that, had radio communications been there involved, Section 605 would apply.

The next position taken by the Government is to the effect that since federal agents made the interceptions as agents of the Federal Communications Commission, such interception was lawful. Appellants would read into the statute authorizing the Federal Communications Commission to make expenditures for the construction of monitoring stations and the fact that monitoring stations previously under the control of the Federal Radio Commission were turned over to the Federal Communications Commission when that body was established, authority to exercise nation-wide surveillance over all communications by radio. One might with equal logic argue that since the same statute authorizes the Commission to purchase law books, it thereby invests the Commission with authority to practice law and to hear and decide general litigation between private litigants. A careful reading of the entire act not only fails to disclose any

intent to grant such authority to the Federal Communications Commission, but in fact negatives any such intent. This same contention was made in the *First Nardone Case* that Section 605 should not be construed so as to hamper agents of the Government in the enforcement of the laws. The Supreme Court, however, gave full effect to the language of Section 605 which directs in clear language that "no person" shall divulge or publish the message (intercepted) or its substance to "any person" and said:

> "It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendment of the Constitution."
> *Nardone vs. U. S.,* 302 U.S. 379, 58 S.Ct. 275, 82 Law Ed. 314.

It is equally plain that the language of Section 605 above referred to applies to agents of the Federal Communications Commission as well as to agents of all other governmental commissions. Effect cannot be given to the language of the *First Nardone Case* above quoted and leave any avenue open for the use of intercepted communications by any agent of the government. If the Congress had intended to permit activities of the nature disclosed by the record, it could, in very simple language, have created an exception to the all-inclusive and broad language of Section 605. Congress did, by proviso, clearly state as to what interceptions of messages Section 605 does not apply, adding the priviso to the end of said section thereby excluding from its application only radio communications broadcast or transmitted by amateurs or others for the use of the general public and signals radioed by ships in distress.

Clear it is from the foregoing that Congress had in mind in enacting Section 605 the broad sweep of its language and the question as to what, if any, messages should be exempted from the broad sweep of the prohibition contained therein. Having this in mind, the Congress did not see fit to extend authority to the Federal Communications Commission and its agents to intercept and divulge radioed communications, which communications might come to its attention in the routine checking of station frequencies and similar matters entrusted to the supervision of the Federal Communications Commission. The provision of Section 605 here involved applies to interception of any communication *and* divulging the same. Accordingly, even if it be assumed that the Federal Communications Commission in the normal discharge of its supervisory powers might be called upon to intercept messages, nonetheless Section 605 operates to forbid divulging the same to *any* person.

It is, of course, well established that generally speaking, a proviso in its normal usage, makes the general enacting clause of the statute to which it is attached applicable to everything subject thereto not exempted through the proviso.

George Moore Ice Cream Co. vs. Rose, 389 U.S. 373, 53 S. Ct. 522, 77 Law Ed. 1265

McDonald vs. U.S., 279 U.S. 12, 49 S. Ct. 218, 73 Law Ed. 582

White vs. U.S., 191 U.S. 545, 24 S. Ct. 171, 48 Law Ed. 295

That the Congress did not intend the Federal Communications Commission to exercise a general supervisory control over all communications made through radio is clearly shown through the express prohibition against any attempt at censorship by the Federal Communications Commission found in Section 326 of the act. As originally enacted in June of 1934, the statute contained a provision making unlawful the use of indecent language in radio communications. By the amendment in 1948 (Chap. 645,

Sec. 21, 62 Stat. 862) this prohibition against the use of indecent language was eliminated and made the subject of a separate statutory crime (Sec. 1464 Title 18 U.S.C.A.). Certainly, if it had been the intent of the Congress to permit the Federal Communications Commission to exercise a nation-wide supervision over the subject matter of radio communications, here would have been the place for an appropriate reference to that power.

Analyzing the applicable provisions of the act, particularly the portion thereof setting forth the powers and duties of the Commission, we find nothing which even remotely hints at an authorization to the Commission that its agents might intercept communications with impunity for the purpose of determining if the sender be engaged in some unlawful project. Section 303 of the act, which sets forth the powers of the Commission, demonstrates that the powers and duties of the Commission are primarily related to apportioning to applicants the bands and frequencies available, regulating the power involved and otherwise exercising an administrative control over radio communication. It is true that in *National Broadcasting Co. vs. United States,* quoted from by appellant in its brief at page 9, our Supreme Court indicated the Commission has powers beyond mere regulation of the engineering and technical aspects of regulation of radio communication. This case, however, involved a broadcasting facility rather than one for private communication and of course under the act as construed with reference to broadcasters, the Commission has much broader powers, since the public convenience is involved. The broadcasting there involved comes within the exception to Section 605 and it cannot be considered as even remotely authorizing what is here contended for by the government.

Even with respect to the power of the Commission to suspend the license of any operator, Section 303(m), we find nothing to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of de-

termining if some crime might be in the making. The Congress specified six general causes for which a license might be suspended:

1. Violation of any Act, treaty or convention binding on the United States which the Commission is authorized to administer or any regulation made by the Commission under any such Act, treaty or convention;

2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;

3. Wilfully damaging or permitting radio apparatus or installations to be damaged;

4. Transmitting superfluous radio communications or communications containing profane or obscene words or language, or knowingly transmitting false or deceptive signals or communications or a call signal or letter not assigned to the station being operated;

5. Wilful or malicious interference with any other radio communications or signals; and

6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of any law but only for violation of any Act, treaty or convention binding upon the United States which the Commission is authorized to administer or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Depart-

ment of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

Section 303 further gives the Commission authority to *inspect radio installations* which are required to be licensed to ascertain "whether in construction, installation and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, of the conditions of the license or other instrument of authorization under which they are constructed, installed or operated." It is significant that the Congress limited the authority of the Commission to *inspect radio installations,* not to supervise, intercept and monitor all radio communications. Certainly, the intent of the statute contemplates a physical inspection of physical installations. Could a radio installation be "inspected" by intercepting its signals, not for the purpose of determining if it is on its assigned frequency and operating within its assigned power range, but for the purpose of ascertaining, in cooperation with the Department of Justice, if some criminal mischief is afoot? A complete analysis of Section 303 eliminates from consideration the possibility of any intent that Congress intended to grant to the Federal Communications Commission the broad power here contended for. In effect, the Federal Communications Commission would establish itself as a second Bureau of Investigation, and while such ready reaching for new fields of endeavor is not uncommon to federal agencies, before such assumption of power is accepted, particularly when it flies in the face of the plain language of a statute condeming the thing which the agency seeks to do, far more direct and clear language must be found in the statute authorizing it.

Turning now to Section 312, which deals with revocation of a station license or construction permit, we again find nothing indicating any thought on the part of the Congress that the Com-

mission was to supervise the contents of private communications by radio. Certainly, had the Congress contemplated that the Commission would be authorized to freely intercept radio communications some recognition thereof would be found through the grant of authority to revoke a station license if communications were emanating therefrom in furtherance of some unlawful purpose. The five causes for revocation listed are these:

1. False statements knowingly made in the application for a license or in any statement of fact in connection therewith;

2. Conditions coming to the attention of the Commission which would warrant it in refusing a license on an original application;

3. Wilfull and repeated failure to operate substantially as set forth in the license;

4. Wilfull or repeated violation of or failure to observe any provision of the Federal Communications Act or rule or regulation of the Commission lawfully authorized;

5. Failure to observe any cease and desist order issued by the Commission.

Without torturing the language of the section, no support can be gained therefrom to the idea that the Congress contemplated general supervision of the contents of all communications by radio by the Commission.

The Government then conjures up in support of its claim to exemption of the Federal Communications Commission from the prohibitions of Section 605 the bogey man of the foreign agent with the short wave radio. The argument is made that if the Federal Communications Commission should learn of this foreign agent broadcasting secret defense information of the United States to his foreign government, it should be permitted to disclose that information to the appropriate authorities. The answer to this

contention is that the problem presented by this argument is for the Congress and not for the courts. Equally well might this argument apply to all telephone conversations. The only lawful purpose of any monitoring by the Federal Communications Commission with respect to private radio communications as distinguished from broadcasting is to ascertain if the assigned frequency is being used and the assigned call letters are those employed and the power expended is within the range permitted. Beyond this thre is nothing in the act with respect to private radio communication as distinguished from broadcasting conferring any authority upon the Commission and indeed, the prohibition against censorship clearly indicates the intent of Congress to preserve inviolate the right of individuals to communicate freely by means of radio without some governmental agency interfering. Accordingly, since the only legal reason for the monitoring station to listen in, in the sense of listening to the actual conversation, would be if it suspected a foreign agent of employing radio, with equal force we might argue then that if any law-enforcing agency suspected a foreign agent of employing the telephone or transcontinental cable in sending such messages, such law-enforcement agency should be permitted to tap the telephone wires.

The Government argues at some length then that since the Federal Communications Commission is authorized to inspect radio installations to ascertain if in construction, installation and operation they conform to the rules and regulations of the Commission and the provisions of the act, by implication there is conferred upon the Commission authority to divulge any information gained thereby.

First off, there is nothing in the act which even indicates the Congress intended to give the Commission any authority to supervise the contents of messages by radio communication other than broadcasting and accordingly, the government starts from the false premise of a power conferred which in fact is not conferred by the act and seeks to draw from such non-conferred power

the further authority, in the face of a flat statutory prohibition, to divulge information which the agency had no authority to gain in the first place. The argument of the Government on page 12 of its brief to the effect that the act should be construed as giving to the Commission power to monitor all radio communications for the protection of the national defense and welfare might well be addressed to the Congress, but to date the Congress has failed to be impressed by that argument and has plainly denied to the Commission the power to intrude itself into the affairs of citizens contrary to the historic American concept of personal liberty.

Finally, the Government turns to the argument that since during a part of the time the witness Stratton was eavesdropping on the conversations between appellees, they had not yet received their operators permits, they were therefore outside the protection of Section 605. It is not disputed that on his first interception the witness Stratton did not have a wire or tape recorder available and only took notes manually, but on the interception September 10th and September 18th, a wire or tape recorder was used (T.R. 37). These tape recordings played a large part in the matter of inducing the claimed co-conspirators to give statements (T.R. 50, 51, 53, 54, 59); were used by the United States Attorney in trial preparation and he proposed to use the witness Stratton for the purpose of testifying to the contents of these intercepted messages without reference to whether intercepted September 18th or prior thereto. Plainly the use of the transcriptions taken on September 18th when no question existed as to full qualification of the station and appellees as operators was so intermingled with the previous interceptions in use both in securing witnesses and evidence, in securing the indictment and for trial preparation that the entire proceeding was tainted from the outset with the "tainted" fruit of the interception which was plainly unlawful.

We believe we might rest here under the rule laid down in the *Second Nardone Case* to the effect that an unlawful interception and its use being shown by the defendant, the Government

then must convince the trial court that it has an independent source of evidence necessary to convict. (See also *U.S. vs. Coplon,* 185 F2d 629 C.C.A.2, Cert. denied, 72 S.Ct. 362, 342 U.S. 920, 96 L. Ed. 690.)

But we cannot agree with the Government's contention that the mere lack of a purely formal permit, occasioned through lack of experience and through reliance upon the guidance of one whose experience and position warranted such reliance, can operate to overturn the protection intended by the Congress in enacting Section 605—can defeat a public policy bottomed upon considerations of ethics and morality.

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in Nardone v. United States, supra. That decision was not the product of a merely meticulous reading of technical language. *It was the translation into practicality of broad considerations of morality and public well-being.* This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 US 379, 384, 82 L ed 314, 317, 58 S Ct 275. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' * * *" (emphasis supplied)
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> *Nardone vs. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 Law Ed. 307

Counsel for the Government rely upon *Casey vs. United States,* 191 F. 2d 1 as sustaining the Government's position. The facts are in nowise similar and, in addition, the Government confessed error on appeal to the United States Supreme Court and the case was re-

versed. True, the error confessed related to an unlawful search and seizure and the admission into evidence of property obtained thereby. The decision, insofar as here in point, was reached without any consideration or discussion of the pertinent Supreme Court decisions and amounted to a mere assertion by the District Judge authoring the opinion that Section 605 did not apply, all without citation of authority or statement of the reasoning supporting the conclusion.

However, the case is easily distinguishable on the facts. The prosecution was for operating an unlicensed station without a permit. It is clear from the opinion that the proof was abundant such operation was wilfull and intentional.

> "The appellants were unlicensed operators transmitting voice messages over an unlicensed station, without call letters, on a portion of the band reserved for Morse Code operations." *Casey vs. U. S.,* supra.

Here the station was licensed, there is no claim of any improper physical operation of the station and the failure to obtain the formal permit required was not wilful or intentional. Certainly there is nothing malum in se in the failure of appellees to check the proper places on the application and send it in for issuance administratively of a simple permit. No public safety is involved—no loss of public funds derived from the licensing of applicant adds to the seriousness of the omission. It was a pure oversight innocently occasioned to complete a mere formal application and yet the government would attach to it the gravest consequences and contend that thereby appellees lost the protection of Section 605, a statute enacted to establish a rule of evidence based upon public policy and considerations of ethics and morality.

If Section 501 (general penalty provisions) applies to the use of the station by appellees prior to securing their operators' license, which is doubtful, it could only become applicable upon

a showing that the appellees so operated their station "wilfully and knowingly" and the record is overwhelmingly against such a conclusion. If appellees cannot be found to have violated the penal provisions of the Act, then certainly the position of the Government, in effect making them outlaws, fair game for any over-zealous law enforcement officer, is not sound.

CONCLUSION

Despite the exact and clear words of the Supreme Court of our land in the *First Nardone Case* denying the claim that federal agents are exempt from the prohibitions of Section 605 and its equally clear language in the *Second Nardone Case* that methods here employed are "inconsistent with ethical standards and destructive of personal liberty" we find the Department of Justice soliciting the unlawful conduct here involved and agents of the Federal Communications Commission boldly seizing the power denied them by the Congress and our courts, apparently upon the theory they are above the law. They would employ the subterfuge of checking to ascertain if the station was operating in accordance with its licensed purpose to gain the forbidden end of intercepting and divulging communications in aid of the Department of Justice in building a criminal case.

We respectfully submit the learned Trial Judge took the only action a federal judge could take when this unlawful purpose and course of conduct was disclosed as the entire foundation of the Government's case, permeating it through investigation, indictment and trial preparation and proposed for use on the actual trial of the cases. *McNabb vs. U.S.* (supra).

Respectfully submitted,
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